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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 CR 850 (JSR)
Telephone Conference

5 PARKER H. PETIT AND WILLIAM
6 TAYLOR,

7 Defendants.

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8 New York, N.Y.
9 October 23, 2020
2:00 p.m.

10 Before:

HON. JED S. RAKOFF,

11 District Judge

12 APPEARANCES

13 AUDREY STRAUSS,
14 Acting United States Attorney for the
Southern District of New York

15 SCOTT HARTMAN
16 EDWARD IMPERATORE

DANIEL TRACER
Assistant United States Attorneys

17 FRESHFIELDS BRUCKHAUS DERINGER US LLP
18 Attorneys for Defendant Petit

19 BY: ERIC BRENDAN BRUCE
JENNIFER LOEB

-AND-

20 KOBRE & KIM LLP
21 BY: MATTHEW I. MENCHEL
AMANDA TUMINELLI

22 QUINN EMANUEL URQUHART & SULLIVAN LLP
23 Attorneys for Defendant Taylor

24 BY: WILLIAM WEINREB
DANIEL KOFFMANN
MICHAEL PACKARD
25 KATHLEEN MARINI

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(The Court and all parties appearing telephonically)

THE COURT: This is Judge Rakoff.

Could counsel please identify themselves.

MR. HARTMAN: Good afternoon, your Honor. Scott Hartman, for the government. And with me on the line for the government are Edward Imperatore and Daniel Tracer from my office.

MR. WEINREB: Good afternoon, your Honor. This is William Weinreb, on behalf of Mr. Taylor. And with me on the line are William Burke, Daniel Koffmann, and Michael Packard. Mr. Taylor is also on the line.

MR. BRUCE: Good afternoon, your Honor. This is Eric Bruce, along with my colleagues, Jennifer Loeb, Matthew Menchel, Amanda Tuminelli, on behalf of Mr. Petit, who is also on the line.

THE COURT: Thank you, all, for calling.

I was a little taken aback by the volume of motions in limine filed in this case. You should all recognize that there's no right to a motion in limine. They are a courtesy provided by the Court in cases in order to help flag in advance issues that might otherwise occupy sidebars or recesses, but as you might anticipate, many questions of what will be allowed and not allowed cannot be made -- many decisions on that cannot be made until well into the trial because they may turn on how things have developed, and trials, by their nature, don't

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1 always go according to plan. Nevertheless, I will give you my
2 rulings on those that I think can be ruled on currently, but I
3 also want to note that all these rulings are subject to the
4 qualification that things could change. The most obvious such
5 instance, which happens, in my experience, very frequently, is
6 that the Court, on a motion in limine, will exclude a certain
7 kind of evidence, and then the other side goes and opens the
8 door, and then I have no choice but to admit that evidence
9 because it's reasonably responsive to what the other side put
10 in. And there's no way I can anticipate that in advance. So
11 all these rulings I'm about to give come with that caveat.

12 The first motion in limine, the defendants move to
13 preclude the government from using certain terms that they
14 consider prejudicial, such as shell company, bribe, kickback,
15 and the like.

16 That motion is denied. Those are everyday terms
17 familiar to most jurors. They are not inflammatory. They
18 describe misconduct, which is what the government is charging,
19 and if they can't be proven beyond a reasonable doubt, of
20 course, that will inure to the benefit of the defendants. So
21 that motion is denied.

22 The second motion is that the defendants move to
23 preclude the government from introducing evidence of
24 Mr. Petit's wealth. I think that this should be granted in
25 part and denied in part. General statements about the wealth

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1 of any party, or any witness, for that matter, is usually
2 totally irrelevant and can be prejudicial. However, the nature
3 and amount of the defendant's compensation from MiMedx is, as I
4 understand it, tied in part to the alleged motive and intent
5 that the defendants had for their alleged misconduct, and in
6 that context, it can be admitted. So the best guidance I can
7 give you at this preliminary stage is a statement, let's say,
8 on opening statement by the government, if the opening
9 statement was, and Defendant X is a rich, rich man, that would
10 be totally improper, but if the statement was something of,
11 "And Defendant X had a financial motive to do what he did, and
12 here's what it was," that would be proper.

13 Third, the government moves to preclude the defendants
14 from introducing evidence relating to their age, health
15 conditions, family background, charitable giving, and military
16 service, or the like. Once again, this motion is granted in
17 part and denied in part. The jury is entitled to have some
18 basics about a party's background, although I caution the
19 defense that this cannot be introduced through hearsay, but if,
20 for example, the defendants took the stand, they could describe
21 their upbringing and things of that sort, that would be
22 perfectly proper.

23 Charitable giving is, I think, less relevant and more
24 likely to be misleading. And military service beyond the fact
25 of military service would probably not be allowed, but, again,

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1 some of this will have to be decided on a question-by-question
2 basis; the most I can do now is give you that general overview.

3 With respect to the fourth motion, the government
4 moves to preclude the defense from introducing evidence
5 relating to punishment and the like. The defense does not
6 object, and says they have no plans of introducing such
7 evidence. So that motion is, depending how you like to look at
8 it, it's either moot or granted on consent.

9 Fifth, the government moves to preclude the defense
10 from introducing evidence about the healing effect of MiMedx's
11 product. I don't really see that this is materially relevant
12 to any issue in this case. It really doesn't go to good faith.
13 The allegation here is an accounting fraud, and if it was a
14 fraud just because you thought the product was good, that's no
15 defense; if there was no fraud, you don't need any evidence
16 that the product was good. So that motion is essentially
17 granted.

18 The sixth motion is Mr. Taylor moves to preclude the
19 government from calling witnesses in MiMedx's accounting
20 department, the audit committee, and Cherry Bekaert, MiMedx's
21 outside auditing firm, seeks to preclude them from answering
22 questions about the accounting treatment of the sales at issue
23 in this case. I think, as I understand it from the
24 government's response, the government primarily wants to ask,
25 if you had known X, or Y, or Z, would you have accounted for

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1 these transactions in the same way you did? And that is
2 perfectly proper. It goes to materiality, it goes to
3 concealment. If we get into more technical accounting issues,
4 I may need to modify this if it begins to look like it's
5 constituting improper expert testimony, but, for now, the
6 motion is denied.

7 Seventh, Mr. Petit moves to preclude the government
8 from having accountants at Cherry Bekaert testify as fact
9 witnesses that the loan to SLR was a related-party transaction
10 that MiMedx was required to disclose in its public filings with
11 the SEC, and that representations from Petit to Cherry Bekaert
12 were false. Although this was filed, as were several other
13 motions from the defense that we'll talk about later, a week
14 after the cutoff date for motions were due, allegedly because
15 the government had not earlier signaled that it would seek to
16 introduce such evidence in its case, which, I might add, is no
17 excuse whatsoever for filing something without permission of
18 the Court beyond the deadline set by the Court, but we'll talk
19 about all that later.

20 I think I cannot rule on this motion until the
21 question is put to the first accountant to whom it is put,
22 because I think it will turn on both how the question is
23 phrased, and what's been admitted up to then, and so forth. I
24 could well conceive that question might not be asked or might
25 not be permitted on direct, but might be permitted on redirect,

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1 so this is a good example of one that I think is appropriate
2 for the Court to reserve on at this time.

3 Eighth, the defendants move to preclude the government
4 from introducing statements from certain unindicted
5 coconspirators unless and until the Court finds these
6 individuals qualify as coconspirators. That used to be the
7 law. It hasn't been law for about 30 years. Statements of the
8 sort referenced here can come into evidence subject to
9 connection. If the connection is not made, I will then
10 instruct the jury, in fairly specific detail, what they need to
11 exclude and not take into account, but the statements will come
12 in at the time proffered.

13 Ninth, the defense moves to preclude the government
14 from introducing evidence concerning parallel civil litigation
15 against defendants. I'm dubious that this will be admitted,
16 but I can't rule finally on it. The government says that they
17 believe this will be a basis to show motive, bias, et cetera,
18 but they also say they will only introduce such evidence on
19 cross-examination. So when we get to cross-examination, if the
20 matter comes up, I'll rule on it then.

21 Tenth, the government seeks to exclude evidence that
22 after the reporting periods at issue in this case, some of the
23 four distributors ultimately paid all or part of their
24 outstanding debts to the company. That is both irrelevant and
25 prejudicial, and that motion is granted.

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1 Eleventh, the government seeks to require the defense
2 to make an evidentiary proffer before offering a
3 reliance-on-accountant defense. I think it's premature. Let's
4 see if the defense does offer this. If so, I may allow the
5 government to call rebuttal witnesses, but until unless it's
6 actually offered, I don't think I need to reach that issue.

7 Twelfth, similarly, the government seeks to require
8 the defense to make a factual proffer before introducing
9 evidence of interactions with lawyers to show the defendants
10 acted in good faith. I'm skeptical that can be done without a
11 waiver of the attorney-client privilege, but, again, it's
12 premature at this point, so we'll deal with it when it is an
13 actuality, if it does become one.

14 Thirteenth, the government seeks to admit evidence of
15 Mr. Petit's prior involvement in a prior enforcement action by
16 the SEC concerning accounting improprieties at Healthdyne, Inc.
17 It's claimed that this is not only 404(b) evidence, but also
18 shows Mr. Petit's knowledge and understanding that certain
19 transactions could be used to conceal the kind of scheme that's
20 charged here in the indictment. Normally, I would rule on this
21 motion after opening statements - let's see what the defense
22 says about their defense in this case - but assuming, as is so
23 often the case in white collar criminal cases, that the defense
24 is lack of intent, then, subject to further argument, I am at
25 least leaning towards allowing this in with, of course, an

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1 appropriate limiting instruction as to Mr. Taylor.

2 Fourteenth, Mr. Taylor moves to preclude the
3 government from introducing evidence relating to the 2016
4 revenue recognition memo absent a showing that Taylor had
5 knowledge reflected in the memo in 2015, when the contested
6 transactions occurred. I think the premise of this motion,
7 that the memo postdates conduct charged in the indictment, is
8 wrong, and so that motion is denied.

9 Fifteenth, Mr. Petit moves to preclude a statement
10 concerning the nature and extent of his involvement in the SLR
11 loan made in the so-called white paper, which, as I understand
12 it, the government intends to introduce to try to show that he
13 misled the audit committee by lying to his own lawyers about
14 his involvement in the SLR loan. I am inclined to think that
15 the probative value of this is more than outweighed by the
16 possibility of confusion and prejudice, and so I grant the
17 motion to exclude.

18 Sixteenth, the defendants move to preclude the
19 government from introducing evidence relating to the audit
20 committee's investigations and findings because they are
21 improper evidence, unduly prejudicial, and so forth. The
22 government argues this motion is moot because it has agreed not
23 to introduce this evidence in its case in chief, but it
24 reserves the right to introduce the evidence during
25 cross-examination.

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1 So this was a classic case where it would be premature
2 for me to rule on it now. If and when it comes up later in the
3 trial, I'll rule on it then.

4 Seventeenth, the defense moves to preclude the
5 government from introducing evidence regarding their respective
6 terminations from MiMedx in 2018. The government says that it
7 had told defense counsel it would not introduce such evidence
8 in its case in chief provided the defense agreed not to
9 question any government witness regarding the separation of any
10 witness from the company following the audit committee report.

11 Again, as that proposed arrangement indicates, it's
12 really premature for me to rule on this now, though I am
13 leaning towards granting the defense motion, but I can't say
14 that for sure until we see how it all plays out.

15 Eighteenth, the defense moves to preclude the
16 government from introducing evidence related to MiMedx's
17 receipt of revenue in 2020. The government argues this motion
18 is moot because it has agreed not to introduce the evidence in
19 its case in chief.

20 I am again leaning towards probably granting this
21 motion, obviously, but given the government's statement, it's
22 premature to rule on it finally at this point.

23 Nineteenth, the defendants move to preclude the
24 government from introducing any evidence related to AvKARE as
25 irrelevant, prejudicial, et cetera. It says that the

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1 government had represented they would not put this at issue.
2 I'm, again, leaning towards granting the motion, but I'm not
3 going to make a final decision now. We'll see how it plays
4 out. For now, it's premature.

5 Twentieth, the government seeks to preclude defendants
6 from introducing evidence that they did not engage in fraud
7 with customers other than CPN, SLR, Stability, and First
8 Medical. That motion is granted.

9 Twenty-first, the government moves to preclude the
10 defense from offering the proffered expert opinions of Jason
11 Flemmons. This relates, also, to a Rule 17 subpoena issue that
12 we'll get to later. At this point, it's premature; we haven't
13 gotten to the defense case. I think it is likely that we will
14 have a hearing outside the presence of the jury probably some
15 evening before we get to the -- shortly before we get to the
16 defense case regarding the proffered expert opinions of
17 Mr. Flemmons, but I decline to rule on them now.

18 Twenty-second, the government seeks to exclude
19 cross-examination of certain witnesses on certain admitted or
20 suspected bad acts, such as an arrest for selling marijuana, a
21 conviction for drunk driving, and the like. While the defense
22 has confirmed that they will not cross-examine regarding these
23 arrests, they say they may seek to show that the witness did
24 not originally disclose certain arrests to the government, and
25 this goes to the cooperation agreement that these witnesses in

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1 some cases had.

2 Again, it's premature for me to rule on this until we
3 get to those circumstances, but I am initially inclined to
4 grant the government's motion. Incidentally, if either side is
5 about to put a question to a witness that seemingly was either
6 precluded by one of my in limine rulings or that I left open,
7 do not put the question in the hearing of the jury. We can
8 either have a sidebar, or often it will be just sufficient to
9 say, Judge, this relates to an in limine ruling you made, and
10 you can use the numbers that I'm giving you this afternoon in
11 saying that, but don't put the question until, of course, I
12 have permitted the question, if I do.

13 There was a twenty-third motion in limine received out
14 of time from the defense, which seeks to preclude the
15 government's summary witness, Corina Chanbury, from testifying
16 regarding the effect of the alleged fraud on Mr. Petit's and
17 Mr. Taylor's bonuses. That motion is denied.

18 There was also filed last night, without permission of
19 the Court, a motion to quash the government's Rule 17 subpoena
20 to the defense expert witness, Jason Flemmons. I may want to
21 hear further argument on this, either in a few minutes or first
22 thing Monday morning, but my initial take is that the defense
23 doesn't have standing to challenge the subpoena.

24 There was also a joint telephone call made to my
25 chambers on October 21st, a couple of days ago, regarding five

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1 new applications. I instructed my law clerk to tell counsel
2 that these would be taken up today, but he did hear enough to
3 know what they were generally about.

4 The first was whether to permit the video testimony of
5 Pam Martin in light of her numerous health issues. That
6 application is granted. I do note that the government,
7 understandably, is miffed that the defense is making this
8 application when they refused to give a similar courtesy,
9 allegedly, to the government with respect to certain government
10 witnesses. However, this is the only application that was
11 brought to my attention, and I think they have made out a case.
12 Moreover, the confrontation clause questions don't arise with
13 respect to a defense witness in the way that they would with
14 respect to a government witness.

15 The second application was the defense asked the Court
16 to reconsider its previous order granting in part and denying
17 in part the defense's request for A/V equipment. By way of
18 background, I granted the defense's request for permission to
19 bring in two trial laptops for realtime transcript feeds,
20 switches and cables, and, indeed, there was a gentleman hired
21 by the defense who was busy in the courtroom earlier today,
22 laying all sorts of switches and cables that was at least
23 interesting to watch.

24 But I have denied defense counsel's request for a flat
25 panel monitor and an A/V table with a skirt. The defense

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1 recognizes that it failed to provide the Court sufficient
2 context for why those things are necessary. I will hear from
3 counsel in a minute on that.

4 The third application was the defense sought leave to
5 submit a letter listing the motions in limine they'd like
6 guidance on from the Court before the trial. The government
7 would also file such a letter. Thank you, but I've already now
8 accommodated, in effect, that request.

9 Application four was the government request that the
10 Court seek a maximum number of alternative jurors. The defense
11 takes no position.

12 I think the appropriate number of alternate jurors
13 here is four, which will also work very well with the seating,
14 so we can have eight jurors in one of the parts of the jury box
15 separated by six feet, et cetera, and the other eight in the
16 other jury box. I will give the defense three peremptory
17 challenges with respect to the alternates, and I will give the
18 government two peremptory challenges with respect to the
19 alternates.

20 And, finally, the government has apparently various
21 orders and affidavits for immunity from three government
22 witnesses and wants to know how to proceed. My standard
23 practice there is you supply me in advance with the relevant
24 papers, we then, out of the presence of the jury, put the
25 witness on the stand, ascertain that he or she will, in fact,

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1 be invoking his privilege against self-incrimination across the
2 board, and then I sign the order, and then the witness gets
3 called when the witness gets called.

4 Incidentally, in the courtroom we will be using, 24B,
5 there is a side room, which, in a different pre-pandemic
6 situation, could be used for conferences. I think that's a
7 good place -- that can easily accommodate up to two witnesses
8 who are going to be testifying after whoever is on the stand.
9 I never, ever want to have a situation where one side or the
10 other, when I say call your next witness, says, oh, Judge, he
11 or she is ten blocks away, or he or she didn't think we'd get
12 there today, or anything like that. But there is, consistent
13 with the courthouse protocols, plenty of room in this
14 conference room right outside the front of the courtroom for at
15 least two pending witnesses.

16 With respect to the selection of the jury, I use the
17 jury box method, which will be slightly affected by the
18 pandemic, but only slightly. We will bring in a panel of 60
19 prospective jurors. About 37, I believe, or, anyway, some
20 portion of them will be in the jury room on the first floor of
21 the courthouse, the others will be in a courtroom on the ninth
22 floor, with total video connection. The jurors will be given
23 seat numbers randomly by the people who run the jury system.
24 So we will have one juror in seat number one, another juror in
25 seat number two, and so forth, and they will be in those seats.

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1 We will meet initially in the courtroom, 26B, at 9:45.
2 When the jurors are all seated, we will go down to begin jury
3 selection. I will examine Jurors 1 through 12 for cause. If
4 any of them are replaced for cause, the first one replaced will
5 be replaced by number 13, who will then come and take the seat
6 of the juror who was excused. So if, for example, two jurors
7 are excused for cause, one number 4 and one number 6, the juror
8 occupying seat 13 would come up and take seat number 4, and the
9 juror occupying seat 14 would come up and take seat number 6.

10 After I've examined the 12 jurors for cause, the
11 parties will exercise their peremptory challenges - six for the
12 government, ten for the defense jointly - and this will be done
13 in rounds. So in the first four rounds, there will be one
14 challenge by the government, two challenges by the defense; in
15 the final two rounds, it will be one challenge by the
16 government and one challenge by the defense.

17 If a party waives its challenge on a given round, it
18 loses that challenge, but it does not lose its subsequent
19 challenge/challenges unless both sides waive across the board
20 on a given round, in which case, we have our jury.

21 After we've gone through that for the basic jury,
22 we'll go through a similar process for the alternate jurors.
23 We'll have the jurors who are next in line, so to speak, come
24 up and take seats 13, 14, 15, 16, and I'll question them for
25 cause, and we will have two rounds of challenges, and the

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1 first, it will be two challenges for the defense, one for the
2 government; the second round, there will be one challenge per
3 side.

4 After the jury is selected, they will be taken to
5 courtroom 26B, and after a short break, we will have opening
6 statements and possibly even the first witness. As I mentioned
7 before, we will normally sit from 9:45 to 3:45, we will take a
8 15-minute midmorning break at some point, and we will take an
9 hour for lunch probably around 12:45 to 1:45, but no break in
10 the afternoon. So if the jury comes back at 1:45, they will
11 sit without a break till 3:45.

12 There will be some days when, because of other
13 matters, we'll have to sit fewer hours I just indicated. The
14 only one that I want to mention now is Election Day, when we
15 will not sit at all. Every other day, Monday through Friday,
16 we will sit, though it won't always be the full 9:45 to 3:45.

17 Now, let me pause. I am not giving permission to any
18 lawyer to reargue any of the motions in limine that I have just
19 ruled on, so that is forbidden, but if there are other
20 questions, and there was the one application that I was a
21 little unclear about, I'm happy to hear from counsel now. And
22 I also want to know how long each of you wants for your opening
23 statement.

24 So let's start with -- there was an application from
25 the defense to put in -- you wanted to give a greater

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1 explanation for -- about a flat panel monitor and A/V table
2 with skirts, so let me hear from whichever defense counsel
3 wants to address that.

4 MR. PACKARD: Thank you, your Honor. This is Michael
5 Packard, on behalf of the defendant, William Taylor.

6 Briefly, your Honor, the situation with the table is
7 that we understand the table that is provided as a matter of
8 course has room, essentially, for one laptop on it, and our
9 trial consultant generally, and preferably, would have two
10 laptops on the table, and a lot of that is to make sure that
11 there aren't any hiccups that would delay presentation to the
12 Court, particularly in --

13 THE COURT: What do you mean by your trial
14 consultants?

15 MR. PACKARD: I'm sorry. That's just the name of
16 the -- that's the title for the individual who would be in the
17 hot seat, I think, is the term used on a previous call.

18 THE COURT: Well, if so, I don't recall it, but are
19 you talking about a lawyer from your firm?

20 MR. PACKARD: No, sir.

21 Actually, I have a realtime update. Our hot seat
22 person, our trial consultant, just walked in the room and
23 advised me that he no longer needs a table, having seen the
24 space today. He just walked into the room where I'm sitting.

25 THE COURT: Great. That's terrific.

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1 The reason I'm asking this is while we're voir diring
2 the jury, if you're making use of outside technical people of
3 one sort or another, we need to at least introduce them to the
4 jury, or at least give their names and their companies' names
5 to make sure that no prospective juror has any connection to
6 that. So keep that in mind when we're selecting the jury.

7 MR. PACKARD: Yes, your Honor.

8 THE COURT: Okay. So it sounds like we're moot on
9 that application.

10 How long does -- let's start with the defense. How
11 long do each of the defendants want for opening statements?

12 MR. BRUCE: Your Honor, this is Eric Bruce, on behalf
13 of Mr. Petit.

14 I think we had previously discussed this with your
15 Honor on a prior call, and you indicated --

16 THE COURT: I think I told you I never allow more than
17 30 minutes on opening statements. But how much do you want?

18 MR. BRUCE: Well, if there's any flexibility on that,
19 if we could have an additional five or ten minutes, that would
20 be helpful, but, if not, of course, we'll adhere to whatever
21 your Honor's ruling is.

22 THE COURT: Well, my impression from -- after a case
23 is over, either I or my law clerk always talk to the jurors,
24 and so I've now had occasion to talk to jurors in over 300
25 trials. One of the things they tell me was, I found that

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1 opening totally confusing, he got into all that detail, and I
2 didn't have any way to really make sense of it at that point.
3 And that's been one of the reasons why I have imposed a
4 30-minute deadline, to prevent confusion of the jurors. So I
5 think I'm going to adhere to that, so there will be 30 minutes
6 a side for each of the defendants.

7 Now, how long does the government want?

8 MR. TRACER: Your Honor, this is Daniel Tracer, for
9 the government. We would ask for 30 minutes, although we'll do
10 our best to come in shorter than that.

11 THE COURT: All right. Very good. So it's 30 minutes
12 for each party. That's great.

13 There may be complications because of the pandemic,
14 but in the normal course, I usually pick a jury within, at
15 most, an hour and a half. And, of course, we can't get started
16 until the jury folks downstairs tell us they're ready, but
17 assuming we were to start at 10:00 o'clock, then we would
18 probably go through all three openings, assuming we have the
19 jury picked by 11:30, and then take lunch at 1:00. If, by
20 contrast, things don't move as quickly, we may take an early
21 lunch and then have all three openings afterwards. If worst
22 comes to worst, we'll bifurcate and have one or two openings
23 before and one after, but I would like to avoid that, if we
24 can.

25 Before I take up the last item on my list, which is

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1 the question of sanctions, is there anything else any party
2 wants to raise with the Court?

3 MR. BRUCE: Your Honor, this is Eric Bruce again, on
4 behalf of Mr. Petit, if I may.

5 Mr. Herenstein had asked us for some background
6 information that would go into a preliminary instruction to the
7 jury.

8 THE COURT: Yes, thank you very much for raising that.

9 MR. BRUCE: Yes, of course.

10 THE COURT: I do this in virtually all my trials, and,
11 again, in talking to the jury afterwards, I've heard unanimous
12 appreciation for doing this. This should be, at most, a
13 two-page document, and it could be even just one page, that
14 says to the jury: You will receive, at the end of the case, my
15 detailed instructions on all the issues, but, for now, I just
16 want to give you a heads-up as to some of the issues that will
17 be presented, so you can devote some of your attention to those
18 issues, and these issues are one, two, three, or something like
19 that.

20 What I ask each side is to prepare a no more than
21 two-page proposed instruction of that sort, submit it to me
22 very early. I like to give this instruction no later than the
23 third day of trial, and it's better the second day, so I would
24 want this instruction by close of business the first day. And
25 then I will put together the instruction, hold a conference

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1 outside the hearing of the jury, and hear whatever each side
2 has to say about objections, or suggestions, or so forth.

3 By the way, we will typically allot some time at the
4 end of the day for any matters that are going to come up the
5 next day that we can foresee like this one.

6 In addition, of course, if there's more urgency, we'll
7 take them up during a break or even during the lunch break, and
8 worst case at sidebar, but I prefer to avoid lengthy sidebars.
9 Again, all the jurors I've ever talked to said that they were
10 bored stiff while sidebars went on for any length of time.

11 In terms of objections that I may have covered
12 previously, normally, objections should be no more than three
13 words. The first word is objection, the second word and the
14 third word are either the nature of the objection in English,
15 like hearsay, foundation, or the like, or a reference to the
16 relevant rule of evidence, like 403. The one addition that
17 we've added today is if it relates to an in limine motion, you
18 can say, "Objection; in limine motion number so-and-so," and I
19 guess even those that's four or five words, I'll allow that
20 exception.

21 Okay. What else?

22 MR. BRUCE: Your Honor, Eric Bruce again.

23 Just so we make sure we submit on the preliminary
24 instructions what your Honor wants, did you want an instruction
25 for each of the two defendants or a joint instruction from the

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1 two defendants?

2 THE COURT: Joint.

3 MR. BRUCE: Joint? Okay.

4 THE COURT: What I'm going to give the jury won't be,
5 of course, just one instruction for all three, for the two
6 defendants and the government.

7 MR. BRUCE: Understood.

8 THE COURT: Yes. Okay, very good.

9 MR. BRUCE: Thank you, your Honor.

10 THE COURT: Anything else?

11 MR. HARTMAN: Your Honor, this is Mr. Hartman, for the
12 government.

13 Judge, we just wanted to raise one issue -- actually,
14 we have a couple of things we wanted to raise with you.

15 One is on Wednesday night, consistent with your
16 Honor's individual practices, we provided the Court with a list
17 of our anticipated witnesses and the order in which we expect
18 to call them. In the course of preparing that, we realized we
19 failed to list the paralegal who we would expect to call as a
20 summary witness in this case. So we were seeking permission
21 for the Court to amend that.

22 THE COURT: Is that the lady whose name I mentioned
23 previously?

24 MR. HARTMAN: No, your Honor. That is an economist
25 who will be doing the bonus calculations, but we were also

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1 anticipating calling someone who would read emails and the like
2 and put in evidence that would not come --

3 THE COURT: What is her name?

4 MR. HARTMAN: His name is Jacob Pechet, P-e-c-h-e-t.

5 THE COURT: I'm sorry.

6 MR. HARTMAN: That's fine.

7 THE COURT: That will be allowed.

8 MR. HARTMAN: Thank you, your Honor.

9 The other question we had is about, to the extent we
10 have other issues, would the Court like to hear those now, or
11 do you want to hold off on those till Monday morning?

12 Specifically, this relates somewhat to the subpoena that the
13 defense filed a motion about. We have some concerns about the
14 disclosures that we've gotten so far and the adequacy of those
15 disclosures, and so we wanted to talk to the Court about that.

16 The other issue is we've identified some areas in some
17 of the defense exhibits that we think may be objectionable, and
18 we wanted to flag those issues for the Court as well, so that
19 that's all teed up.

20 THE COURT: Well, the latter, again, just strikes me
21 as totally premature. If I recall correctly, the government
22 and the defense think this case is going to go, what, three,
23 four, even five weeks. Do I have that right?

24 MR. HARTMAN: That's --

25 THE COURT: So there's going to be plenty of time

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1 before we get to the defense exhibits, so I don't see any
2 reason why I should deal with them today.

3 On the other issue, about the subpoena and the scope
4 of what you receive, I will deal with that in a minute, so
5 we'll come back to you on that before this call is over.

6 MR. HARTMAN: Okay. Thank you, Judge. Those are the
7 only issues we have at this time, then.

8 THE COURT: Okay.

9 Anything from the defense?

10 MR. BRUCE: Nothing for Mr. Petit. Thank you, your
11 Honor.

12 MR. PACKARD: Nothing for Mr. Taylor, your Honor.

13 THE COURT: Okay.

14 So, I was so excited when I got this case because, in
15 addition to the excellent AUSAs, I saw that the defendants were
16 represented by some of the most illustrious law firms in the
17 country. So I was totally taken aback when it seemed like
18 repeatedly my rules and my orders were being disregarded. So
19 does someone want to speak to that?

20 MR. WEINREB: Yes, your Honor. This is Bill Weinreb,
21 counsel for Mr. Taylor.

22 Your Honor, I want to sincerely apologize for
23 submitting those filings without following the Court's
24 procedures. It was just careless of me in not observing the
25 October 19th deadline for filing motions in limine without

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1 advance permission. And the Court's absolutely right, the fact
2 that we received things after the deadline is no excuse for not
3 having called to seek permission to file those, but if I can be
4 permitted a word of explanation, it was simply in the rush of
5 responding to things and doing all the last-minute things that
6 lawyers do in advance of a trial. Frankly, the fact that there
7 had been -- October 19th was a cutoff date slipped my mind, and
8 it was just pure carelessness on my part, and I deeply regret
9 it. I can only apologize.

10 THE COURT: Well, thank you for that apology. I will
11 not impose, then, any sanctions, but I will warn counsel that
12 recidivism will not be taken lightly.

13 All right. I think the only remaining thing, then, is
14 the government wanted to talk about the responses they've got
15 to the subpoena or something like that?

16 MR. HARTMAN: Yes, your Honor.

17 So the defense has filed a motion to quash a subpoena
18 that we served on their expert. And what prompted our sending
19 that subpoena is that we've been engaged in dialogue with the
20 defense about the disclosures that we have received in this
21 case generally and also with respect to Mr. Flemmons. The
22 parties had agreed on a date for a 26.2 material to be
23 exchanged, and today, we've only received one piece of material
24 for one witness despite the fact that there are numerous
25 witnesses that are listed on the defense witness list.

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1 But, specifically, this is an issue particularly with
2 respect to Mr. Flemmons because while we did receive notice of
3 his testimony, we haven't received an expert report, we haven't
4 received the other types of disclosures that you would
5 typically get with an expert witness. So we wrote to the
6 defense, and we asked for those things. We asked for a copy of
7 the report, if there was one; we asked for any drafts of the
8 report; we asked for information about compensation and
9 communications with the expert about the scope of work and the
10 defense request for what the expert would do. And the response
11 was, you're not entitled to that information, and we're not
12 providing it.

13 So where we are, Judge, is that we -- I know the Court
14 is very focused on expert testimony and the admissibility of
15 expert testimony, and we don't feel that we have sufficient
16 information about this witness and what he would say to
17 properly raise with the Court and litigate issues about what
18 wouldn't be permissible and also to prepare to rebut this
19 evidence, if necessary or appropriate.

20 THE COURT: All right.

21 Before I hear from defense counsel, is the government
22 calling any experts?

23 MR. HARTMAN: We are not.

24 THE COURT: Okay.

25 Is the defense calling any experts other than

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1 Mr. Flemmons?

2 MR. WEINREB: This is Bill Weinreb again.

3 No, your Honor, we are not.

4 THE COURT: I'm very sorry this didn't come up sooner
5 because it is an area that has absorbed a lot of my attention
6 over the years. In civil cases, the Federal Rules of Civil
7 Procedure lay out in great detail what has to be produced with
8 respect to an expert long before trial; indeed, of course, you
9 also get a deposition of the expert in civil cases.

10 In criminal cases, the rule has been much more
11 relaxed. I proposed, two years ago, to the relevant committee
12 of the federal judiciary a rule that would make the disclosures
13 in criminal cases parallel those in civil cases, other than
14 depositions, and although the committee did not go that far,
15 they have promulgated a proposed new rule, which unless
16 Congress vetoes it, will take effect on December 1st. But, of
17 course, that's not binding on you because this trial will be
18 over by December 1st.

19 By the way, that's pretty much what I'm going to tell
20 the jury. I'm going to say this will be a multiweek trial, we
21 hope to finish it by Thanksgiving, though, we can't guarantee
22 that, but we are more than confident that it will be over by
23 the end of November. So if anyone disagrees with that, say so
24 right now.

25 But, in any event, on that assumption, the new rule

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1 doesn't govern. But I don't see any reason why there shouldn't
2 be such disclosures from the expert to allow the other side to
3 challenge his opinions. Inherent in the nature of expert
4 testimony is that it involves a lot of, if you will, silent
5 background about the expertise, training, skills, and so forth
6 of the expert. This, in part, was an argument, in effect,
7 being made by the defense in this case in some of the motions
8 in limine when they were arguing that some of the government's
9 witnesses that were purportedly fact witnesses were really
10 concealed expert witnesses. But the point comes down to the
11 same point either way -- it is just not fair to put an expert on
12 the stand and expect the other side to be able to meaningfully
13 cross-examine that person without knowing in advance a
14 reasonably detailed account of what that expert is going to
15 say.

16 So here's how I have handled this problem in the past,
17 and I will throw out the alternatives and see if any of them
18 commend themselves.

19 One is to give the party -- often it's the
20 government's expert, and the party that doesn't know what's
21 going on is the defense, but, in this case, it's vice versa --
22 give the party that is not calling the expert a three-hour
23 telephonic deposition with the expert well in advance of when
24 the expert is to be called.

25 The second possibility is for the party calling the

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1 expert to provide the other side with an expert report and
2 expert disclosures more or less modeled on those of Federal
3 Rule of Civil Procedure, I think it's 26.

4 And, in either case, I almost always hold an
5 evidentiary hearing out of the presence of the jury with the
6 witness shortly before the witness testifies to get a sense of
7 what can or cannot be admitted.

8 So let me ask defense counsel, on those first two
9 alternatives, which do you prefer?

10 MR. WEINREB: Your Honor, this is Bill Weinreb.

11 You put us a bit on the spot because we have two sets
12 of defense counsel here and don't have an opportunity to
13 confer.

14 THE COURT: That's fair enough. So let me know by
15 email to my law clerk no later than 5:00 o'clock today which of
16 those two alternatives you prefer. Don't tell me you don't
17 want either; that will not be acceptable.

18 MR. WEINREB: Understood.

19 THE COURT: All right.

20 I think, for the moment, that should satisfy the
21 government. If there is a deposition or there is an expert
22 report, it's going to have to be in the next week or so, to
23 give the government plenty of time to prepare.

24 MR. WEINREB: Thank you, your Honor. Yes.

25 THE COURT: Okay. Anything else we need to take up?

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1 MR. WEINREB: Yes, your Honor. This is Bill Weinreb.

2 So, given that this is how that issue is going to be
3 handled, would the Court offer us any guidance on the subpoena,
4 the Rule 17 subpoena, that we can convey to Mr. Flemmons?

5 THE COURT: So Mr. Flemmons, does he work for a
6 company?

7 MR. WEINREB: He does.

8 THE COURT: Do they have a lawyer representing him?

9 MR. WEINREB: They don't, I believe, have a lawyer who
10 would be in a position to represent him directly. They would
11 have to engage outside counsel to do so.

12 THE COURT: I mean, they're the ones who have the
13 standing to challenge the subpoena. There are limited
14 challenges that the defense can bring, but the great bulk of
15 challenges can only be brought by the party receiving the
16 subpoena.

17 MR. WEINREB: Well, your Honor, we understand that the
18 defense's right to challenge it may be limited. In this case,
19 we believe that we have made meritorious challenges, which are
20 in the pleading that we filed. And, in addition, it was our
21 reading of the case law that the recipient of the subpoena can,
22 particularly in this situation where it's an expert for one of
23 the parties, authorize the party to represent them in
24 connection with the subpoena.

25 THE COURT: I haven't seen any such authorization. If

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1 you obtain that authorization, I agree, that might solve the
2 problem. All right. So I think the best way to handle this
3 is, on Monday, we're getting together at 9:45. Experience
4 suggests that the jury panel won't be ready until about 10:30,
5 10:15 at the earliest, so we will have a half hour at least.
6 So I will hear then any argument either side wants to make on
7 anything related to the subpoena if the person appearing on
8 behalf of Mr. Flemmons is authorized to represent him. And
9 I've gotten already from my law clerk some idea of what the
10 issues are, but in a moment of complete weakness, I will
11 authorize both sides, if they want to put in anything further
12 on this issue, they can submit to my law clerk's email, by no
13 later than 5:00 p.m. on Sunday, a letter, not to exceed three
14 single-spaced pages, adding anything else you think might be
15 helpful to the Court when I hear oral argument on this on
16 Monday morning.

17 All right. Anything else?

18 MR. HARTMAN: Nothing from the government, your Honor.
19 Thank you.

20 MR. BRUCE: Nothing from Mr. Petit, your Honor. Thank
21 you.

22 MR. WEINREB: And nothing more from Mr. Taylor, your
23 Honor. Thank you very much.

24 THE COURT: Very good. I look forward to seeing you
25 all on Monday, and have a good weekend. Bye. * * *